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No. 25

# In the Supreme Court of the United States

October Term, 1937

No. 25

COMMONWEALTH OF PENNSYLVANIA, EX REL. ELMER SULLIVAN, Petitioner

*v.*

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA, Respondent

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA*

## BRIEF FOR RESPONDENT

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*v.*

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA, Respondent

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA*

## BRIEF FOR RESPONDENT

## OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 325 Pa., 305, 188 Atl. 841 (1937).

## JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that there is drawn in question the validity of a statute of the Commonwealth of Pennsylvania which is alleged to be repugnant to the Equal Protection provision of the Fourteenth Amendment to the Constitution of the United States.

The judgment below was rendered and filed January 11, 1937, (R. 22). Petition for a writ of certiorari was filed herein April 9, 1937, and the petition granted May 17, 1937, (R. 27).

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## STATUTE INVOLVED

The Act of 1860, March 31, P. L. 382, Section 3, reads:

"ESCAPE OR RESCUE OF PRISONERS—ESCAPE AND BREAKING PRISON.—If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable on conviction by simple imprisonment without labor; *if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is.*

*for imprisonment for life shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him.* (1860, March 31, P. L. 382, Sec. 3)"
(Italics ours)

## COUNTER STATEMENT

This case arose through a petition filed in the Supreme Court of Pennsylvania by the petitioner for a writ of habeas corpus. The Supreme Court, exercising its original jurisdiction, granted a rule to show cause why such writ should not be granted.

From the petition for habeas corpus (R. 1-14), it appears that the petitioner had originally been sentenced, on April 26, 1929, to serve a term of 3 to 6 years in the Western State Penitentiary. It further appears that on December 28, 1931, petitioner escaped from said prison and was subsequently recaptured. Pursuant to indictment found, the petitioner on December 31, 1931 was sentenced for said breaking of prison to a term of not less than 3 years, nor more than 6 years, to be computed from the expiration of the original sentence.

The petition alleged that the petitioner was illegally confined and unlawfully restrained of his liberty.

The Supreme Court of Pennsylvania, in discharging the rule, held that the only question before it was whether or

not Section 3 of the Act of March 31, 1860, P. L. 382, was unconstitutional as depriving the petitioner of the equal protection of the laws guaranteed by the fourteenth amendment of the Constitution of the United States, and decided (R. 33-37) that the said section did not contravene the amendment. The Pennsylvania Act in question provides, in effect, that any prisoner imprisoned in any penitentiary or jail who breaks such penitentiary or jail shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment to commence from the expiration of his original sentence for a period of time not exceeding the original sentence by virtue of which he was imprisoned when he so broke prison.

## SUMMARY OF ARGUMENT

1. The Fourteenth Amendment, in granting the equal protection of the laws, does not require a mathematical nicety but permits the state legislature to make a reasonable classification in its statutes.

2. The legislature, in providing that the trial court may impose a maximum sentence as long as the term of the original sentence, makes a reasonable classification.

## ARGUMENT

The particular amendment to the United States Constitution, invoked herein by the petitioner, has so often been construed by the United States Supreme Court that no question can reasonably arise as to its meaning. In OLD DEARBORN DISTRIBUTING COMPANY *v.* SEAGRAM DISTILLERY CORP., 299 U. S. 183, 197, 57 S. Ct. 139, 146 (1936) Mr. Justice Sutherland remarked,

> "As this court many times has said the equal protection clause does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' COLGATE *v.* HARVEY, 296 U. S. 404, 422, 423, 56 S. Ct. 252, 255, 256, 80 L. Ed. 299, 102 A. L. R. 54, and cases cited."

In any case where it is contended that a state statute denies the equal protection of the laws, it may be helpful to refer to LINDLEY *v.* NATIONAL CARBONIC GAS COMPANY, 220 U. S. 61 (1911) where Mr. Justice Van DeVanter stated that,

> "The rules by which this contention must be tested, as is shown by repeated decisions of the court are these:
>
> (1) The equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> (2) A classification having some reasonable basis does not offend against that clause merely because it is

not made with mathematical nicety or because in practice it results in some inequality.

(3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

(4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. BACHTEL *v.* WILCOX, 204 U. S. 36, 41; LOUISVILLE AND NASHVILLE R. R. CO. *v.* MELTON, 218 U. S. 36; OZARK LUMBER CO. *v.* UNION COUNTY BANK, 207 U. S. 251, 256; MUNN. *v.* ILL., 94 U. S. 113, 132; HENDERSON BRIDGE CO. *v.* HENDERSON CITY, 173 U. S. 592, 615." (p. 79)

Tested by the application of these rules, sec. 3 of the Act of Pennsylvania of March 31, 1860, P. L. 382 will be found to be consistent with the requirements of the fourteenth amendment.

Although no statute identical with the one here attacked has ever been passed on by the United States Supreme Court, others involving substantially similar principles have been scrutinized and upheld. Thus, it has long been held that there is no violation of the equal protection clause of the Fourteenth Amendment where individual offenders having committed the same offense are given different sentences. HOWARD ET AL *v.* STATE OF NORTH CAROLINA, 191 U. S. 126 (1903). So too, a statute providing for the imposition of indeterminate sentences in punishing those convicted has been held constitutional. UGHBANKS *v.* ARMSTRONG, 208 U. S. 481 (1908). Further, the Supreme Court has sanctioned the reference to the criminal's past record of offenses as a basis for classification by state legislatures. In UGHBANKS *v.* ARMSTRONG, supra, the Michigan statute provided

that as to a prisoner twice convicted of felony there should be no privilege of parole. In holding this to be a reasonable classification, the court stated that the fourteenth amendment,

> "was not intended to, and does not limit the powers of the state in dealing with crimes committed within its own borders or with the punishment thereof, although no State can deprive particular persons or classes of persons of equal and impartial justice under the law." (p. 487.)

Perhaps the most striking illustration of the availability of the past history of the offender as a basis for a reasonable classification by the legislature in prescribing a punishment for criminals is the habitual offender statute. In the language of Mr. Justice Stern, writing for the Pennsylvania Supreme Court in the instant case,

> "The most reliable guide to a judicial solution of the legal problem here presented is that offered by the decisions of the courts sustaining habitual criminal acts. In GRAHAM *v.* STATE OF WEST VIRGINIA, 224 U. S. 616, 623, upholding such a statute, the Supreme Court of the United States said: 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts if similar import in many States. This legislation has uniformly been sustained in the state courts, * * * and it has been held by this court not to be repugnant to the Federal Constitution.' It was also said (p. 630) that 'The fact of such [prior]

sentence, indicating the gravity of the offense, affords a reasonable basis for classification.'

In MOORE *v.* MISSOURI, 159 U. S. 673, such a statute was attacked on the ground that it prescribed different punishment for different persons for committing the same offense. The Supreme Court pointed out that the punishment for the later offense was rendered more severe only in consequence of the defendant's previous conduct. The court said (p. 677): 'Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every other person in like case with him, convicted as he had been, would be subjected to the like punishment. The Fourteenth Amendment means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances": MISSOURI *v.* LEWIS, 101 U. S. 22. The general doctrine is that that amendment, in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the State to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State: IN RE CONVERSE, 137 U. S. 624. And the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated: PACE *v.* ALABAMA, 106 U. S. 583; LEEPER *v.* TEXAS, 139 U. S. 462.'

> An habitual criminal statute of Massachusetts was held constitutional in McDONALD *v.* MASSACHUSETTS, 180 U. S. 311, of Wisconsin in INGALLS *v.* STATE OF WISCONSIN, 48 Wis. 647, 4 N. W. 785; of New York in PEOPLE *v.* SICKLES, 156 N. Y. 541, and of California in PEOPLE *v.* COLEMAN, 145 Cal. 609, 79 Pac. 283. In the last named case it was said: 'Penal laws are not so much for the punishment of the offender as for the protection of society, and experience has shown that the persistent and hardened offender is more dangerous to society than a person who has committed but one offense, and that a severer punishment is demanded in such case, the better to protect society." (pp. 308, 309.)

Moreover, in FINLEY *v.* CALIFORNIA, 222 U. S. 28 (1911) the United States Supreme Court upheld a classification based upon the term served by prisoners. Section 246 of the Penal Code of California inflicted a death penalty for assault with intent to kill committed by life time convicts in state prisons. It is significant that Mr. Justice McKean, by direction of court filed a *memorandum* opinion holding the classification reasonable and the statute constitutional.

These cases lead to the conclusion that the United States Supreme Court has consistently held that the past history of the offender may be the basis for a reasonable classification. And, more than one state court has upheld legislation providing for the imposition of a severer sentence on one who had committed a prior crime of the same nature. Illustrative are HUYSER *v.* COMMONWEALTH, 116 KY. 410, 76 S. W. 174 (1903) : PEOPLE *v.* SICKLES, 26 App. Div. 470, 50 N. Y. S. 377 (1898).

In dealing with the problem of the imposition of punishment for escape or aiding prisoners to escape, legislatures have more than once attempted to classify by referring to the prison sentence served by the escaped criminal. Thus,

in KELLEY *v.* MEYERS, 124 Ore. 322, 263 Pac. 903 (1928), such a statute was held constitutional. New York is another state which imposes punishment for aiding the escape of a criminal on the basis of the nature of the offense for which the escaped convict was originally incarcerated (see sec. 1696, N. Y. Penal Law).

The petitioner relies on three state decisions, as supporting his position that the present statute is unconstitutional. Two of these are clearly distinguishable. The third is ill-advised. Thus, in the leading case of IN RE MALLON, 16 Idaho 737, 102 Pac. 374 (1909) the statute involved provided,

> "Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison." (Sec. 6452, revised codes of Idaho.)

The court held that the statute was in violation of the Fourteenth Amendment. The distinction between that statute and the Pennsylvania statute is obvious. No discretion is there permitted the judge in imposing sentence for the commission of the offense of escape. Moreover, the court which declared the Idaho statute unconstitutional emphasized that distinction:

> "It is argued by the Attorney General that a critical examination of this statute will lead to the conclusion, that the legislature, in prescribing the punishment for escape, intended to fix the maximum penalty to be inflicted at not to exceed the term which the convict was serving at the time of his escape, and to leave to the discretion of the trial court the punishment not exceeding the maximum * * *" *To give this construction to*

> *this statute it seems to us would be to legislate upon the subject, and supply what we might conceive to be necessary in order to sustain the constitutionality of the statute.* If this be the rule which would guide courts in determining the constitutionality of a statute, the court would have little difficulty in sustaining all legislative acts, because they might supply all such defects or alterations by judicial legislation. We, however, must take this statute as it reads, and when so taken, the punishment is fixed arbitrarily, and is not in any sense left to the discretion of the trial court. * * *" (16 Idaho 737 at 749, 750, 102 Pac. 374, at 377, 378.) (Italics added.)

The MALLON case, therefore, if of any authority on the question here involved, must be regarded as supporting the position of the respondent.

In the other case, STATE *v.* LEWIN, 53 Kan. 679, 37 Pac. 168, the statute also imposed a term equivalent to that being served by the escaping prisoner. Not only was that statute distinguishable from the Pennsylvania Act but it is important to note that the statute was declared unconstitutional as being in violation of the state constitution, so that anything said by the court in reference to the effect of the Fourteenth Amendment of the United States Constitution may be disregarded as pure *dictum,* [twice removed]. The third case, STATE *v.* JOHNSEY, 46 Okla. Cr. App. 233, 287 Pac. 729, dealt with a statute similar to that involved herein. There, the statute fixed a maximum only. The court held that it was unconstitutional as being in violation of the fourteenth amendment, relying on IN RE MALLON. It is submitted, that all three opinions are of little authority. The first two contain only *dicta,* and the third is incorrect for reasons already adverted to and following.

In permitting a judge to impose a maximum not exceed-

ing the term of the original sentence, the present statute makes a reasonable classification. In the language of Mr. Justice Stern, speaking for the court below:

> "The real question is whether a statute adopts an unreasonable classification when, in providing for the sentencing of persons who commit identical crimes, it authorizes the imposition of a severer sentence upon one who had previously offended more grievously than another. The answer would seem to be obvious. Probably every day, in every criminal court in the country judges impose unequal sentences upon defendants who have committed the same offense but where their former records of crime are different. If judges are properly permitted to exercise such discretion, certainly the legislature by a general statute can enact into law the expression of a similar policy.
>
> "The classification effected by the act here under attack is justified. The longer the sentence which is being served by a prisoner, the greater his temptation to seek to escape, and the greater therefore the penalty which must be imposed in order to act as an effective deterrent. Furthermore, the breaking from prison of one who is serving a long sentence, and therefore presumably has been guilty of a serious crime, involves a greater potential danger to society than the escape of a petty offender. Against a greater menace society is warranted in seeking a larger measure of protection.
>
> "The time has long passed in the development of penology when it was considered that a given punishment should automatically attach to a given crime. Penology is not, and probably never can become, an exact science. Sentencing criminals is a sociological problem, and as such demands a wide range of adaptation to social needs in the treatment of individual cases." (pp. 307, 308)

Other expressions of the unanimous recognition on the part of the practical criminologist that there is no complete similarity between individuals committing the same anti-social act may be found in Metcalf, *Recidivism and the Courts,* (1935), 26 Journal Criminal Law 367, 369 and Harno, (1936), *Rationale of a Criminal Code,* 85 U. of P. L. Rev. 549, 555. In the latter article it is stated:

> "Closely associated with the position that the basic aim of the criminal law is the protection of society is the doctrine of individualization of punishment. This doctrine involves dealing with the offender according to the risk he creates for society; it requires that the nature of the punishment be determined by the nature of the individual. Under it, the criminal is dealt with on the basis of his present and potential dangers to society, and only when he is judged a safe risk is he released."

The Pennsylvania Statute is an attempt on the part of the legislature to vest the power of punishing individual criminals within the discretion of the judge in order to bring about the best result from the standpoint of the offender and society as a whole. In the report of the commissioners who drafted the Pennsylvania Criminal Code of 1860, it was stated:

> "The provisions of this section and section 253-255-257-260, of this title are new to our statute law, although punishable at common law. They will be found to provide against a series of offense which either defeat or seriously impede the administration of criminal justice. A wide range of discretion in the punishment of these crimes is necessarily given to the courts, because they are so varied in their nature, and so different in their intrinsic magnitude, that it would be impossible to make even an approximate approach to the extent of penalty which should be applied to each particular

case as it arises. The common-law punishments now attached to them, of fine and imprisonment, have no limits other than the discretion of the court. Those prescribed by these sections restrain this general power as far as it has seemed to us to be judicious or practicable. The only existing statutory penalties against these crimes are found in the thirty-first and thirty-second sections of the act of 1790, April 5, 2 Sm. L. 531, and the sixth section of the act of 1807, April 4, P. L. 133, 4 Sm. L. 393 (repealed 1860, March 31, P. L. 427, Sec. 79). These laws punish negligent escapes suffered by jailers, with fines, and make escapes by prisoners sentenced to hard labor punishable with such additional hard labor and corporal punishment, not extending to life or limb, as the court before whom such escaped prisoner shall have been convicted, shall adjudge and direct; a discretion in the application of punishment certainly sufficiently liberal." (Report on the Penal Code, 12, 13.)

It must be remembered that that very discretion permitted the trial judge is designed, and properly so, to prevent the injustice which the petitioner fears may result from the application of the Pennsylvania Act.. It may be assumed, for the purpose of this argument, that there are two prisoners, one serving a twenty year term for some form of homicide, and the other serving a five year term for a larceny conviction. Let it be supposed that the twenty year convict has a record of one offense, namely, the homicide committed in a fit of passion. The five year convict is a hardened criminal. By constant irritation, the five year convict persuades the other to join him in an escape plot. In such case, the Pennsylvania Statute permits the Judge trying the escape charge to take into account the circumstances surrounding the commission of the offense both are charged with; that the twenty year convict in reality was but the Trilby of the five year con-

vict Svengali. He may in the exercise of sound judicial discretion thereupon impose a maximum of five years upon the instigator of the escape plot and as little as one day upon the other, the twenty year convict. It is no answer to this to point out that in most of the cases in which the trial courts have imposed sentences for the offense of escape that the maximum term has been invoked as the punishment. It must be assumed that the circumstances were such as to warrant the imposition of the maximum term in sentencing the escaping prisoners.

Some effort is made by counsel for the petitioner to demonstrate that there is something unusual about the Pennsylvania Statute. It is, of course, elementary and so conceded by counsel for the petitioner that the fact that a statute is unique does not render it unconstitutional. That necessarily destroys any possible efficacy of his argument. Nevertheless, it may be pointed out that the analysis in the petitioner's brief is not accurate. In the first place, on page twenty-two of the petitioner's brief it is stated that Indiana has a statute substantially the same as that under attack here. Moreover, from the rest of the data submitted by counsel for the petitioner, we draw conclusions differing greatly from those advanced by him. Counsel for the petitioner states that while some of the statutes make the punishment light, and others make it heavy, *all* make it certain. An examination of the summary of state laws pertaining to escape submitted in the brief for petitioner shows that at least twenty-five do not provide for definite terms, but supply in some cases only a maximum term and in others a maximum and a minimum. In all of these the sentence is anything but certain. Thus in New Mexico, an escaped convict may be sentenced to not less than twenty-five years nor more than fifty years; and in Nevada, the offense is made a misdemeanor with no definite sentence specified. What is perhaps more important is that an examination of the

statutes listed by counsel for the petitioner discloses that in at least a dozen, the character of the offense of escape and the punishment therefor imposed depends upon circumstances other than the bare physical fact of escape. Thus, in four States, namely, Arkansas, Connecticut, Missouri and Wisconsin, the punishment depends upon the place from which the prisoner escaped. (The penitentiary or state prison or county jail, etc.); and in seven others, namely, Arizona, Idaho, Maine, Minnesota, New York, North Dakota and Washington, the punishment depends upon whether the escaping prisoner had been incarcerated for the commission of a felony or a misdemeanor. Thus, in all eleven, the punishment to be imposed for the offense of escape depends upon some fact such as the nature of the place of confinement or the label that might be attached to any one of the multitude of offenses from the punishment for which the prisoner has escaped. And as already has been pointed out, in Indiana, the Judge may sentence the escape offender to a term not exceeding the original term. From the foregoing, it would seem that if there is anything peculiar about the Pennsylvania Statute its uniquity lies in the fact that it is peculiarly well adapted to deal with a most difficult problem in the administration of criminal justice.

In taking into account the nature of the punishment in sufferance of which the escaping prisoner was incarcerated, the Pennsylvania Statute has followed the long practice of the common law. (See 2 Bishop Criminal Law, 9th edition, 1923), 1076; see also IN RE: FINLEY, 1 Cal. App. 198, 208, 81 Pac. 1041, 1045 (1905). Moreover, it is significant that in all the years it has been on the Pennsylvania Statute Books, its constitutionality has never been doubted. Indeed, it seems to have been assumed in at least one Pennsylvania appellate court decision. See COMMONWEALTH *v.* ADAMS, 3 Pa. Super. 167 (1896); cf EX PARTE CLIFFORD, 29 Ind. 106 (1867). While not conclusive, these facts are strong evidence

of the reasonableness of the classification and of the constitutionality of the statute. "Not lightly vacated is the verdict of quiescent years": Cardozo, C. J. in COLER *v.* CORN EXCHANGE BANK, 250 N. Y. 136, 141, 164 N. E. 882, 884 and cf. OWENBEY *v.* MORGAN, 256 U. S. 94 (1921); see COMMENT, (1930) 30 Col. L. Rev. 1059.

## CONCLUSION

The judgment of the Pennsylvania Supreme Court holding the statute constitutional should be affirmed.

Respectfully submitted,

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